NTSB Order No.
EM-45

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 4th day of September 1975.

O. W. Siler, Commandant of the United States Coast Guard

vs.

ROGER J. BEROUD, Appellant.

Docket ME-43

OPINION AND ORDER

Appellant is seeking review of the Commandant's decision affirming the revocation of his seaman's document under authority of 46 U.S.C. 239b.[1] In prior actions, appellant had a hearing before Administrative Law Judge Francis X. J. Coughlin and appealed from the latter's initial decision to the Commandant (Appeal No. 2005).[2] Throughout these proceedings, appellant has been represented by his own counsel.

The law judge found that, on September 4, 1973, appellant was the holder of a merchant mariner's document (No. Z-874063-D3 R)

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[1]46 U.S.C. 239b provides, in pertinent part, as follows: "THE Secretary [of Transportation] may-- ...(b) take action, based on a hearing before a Coast Guard examiner, under hearing procedures prescribed by the Administrative Procedure Act, as amended, to revoke the seaman's document of-- (1) any person who, subsequent to July 15, 1954, and within ten years prior to the institution of the action, has ben convicted in a court of record of a violation of the narcotic drug laws of the United States, the District of Columbia, or any State or Territory of the United States, the revocation to be subject to the convictions becoming final...." The Commandant, by delegation,exercises the Secretary's authority in cases arising under the statute. 46 CFR 1.46(b). See Commandant v. Snider, 1 N.T.S.B. 2177 (1969). See also 37 Fed. Reg. 16787, August 19, 1972, concerning the change of title from hearing examiner to administrative law judge.

[2]Copies of the decisions of the Commandant and the law Judge are attached.

and was convicted of violating narcotic drug laws of Pennsylvania, in a Pennsylvania state court of record.[3] He concluded that the revocation of this and all other seaman's documents held by appellant was required because of the conviction. The law Judge thereupon entered that section, which was upheld by the Commandant on grounds that appellant "was convicted of twice trafficking in substantial quantities of marijuana and these cannot be considered minor offenses."

Other findings of the law judge and the Commandant reflect the nature and gravity of the offenses for which appellant was convicted. According to the uncontroverted court records received in evidence, he was indicted for unlawful possession and delivery.[4] of 82 and 74 grams of marijuana, respectively, on July 7 and 18, 1972.[5] The conviction record indicates that appellant, having counsel, pleaded guilty and was sentenced upon conviction to undergo imprisonment for a period of 1 to 5 years.[6] All facts thus found relative to appellant's drug law violations and conviction therefor are undisputed.

In appellant's brief on appeal, he contends that the law judge would have exercised some discretion in his favor as indicated by his statement that "the matter in mitigation is sufficiently interesting as to warrant my bringing it to Headquarters' attention";[7] that such discretion would be authorized under 46 U.S.C. 239b; but that the law judge was prevented by regulation from exercising it. He argues for "something less than revocation" because of the means employed by his defense counsel in eliciting a guilty plea when he "should have interposed a vigorous defense of entrapment"; a further argument that the offenses involved "very small amounts" of marijuana; and other factors adduced in mitigation. He, therefore, urges that we reverse the prior

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[3] The Common Pleas Court of Delaware County, Media, Pa. See, 17 P.S. §221, Purdon's Pennsylvania Statutes Annotated.

[4] The "delivery" offenses were properly found by the Commandant, although overlooked by the law judge.

[5] Charges were brought under Pennsylvania's Controlled Substance, Drug, Device, and Cosmetic Act, which classifies the possessory offenses as misdemeanors and the delivery offenses as felonies. 35 P.S. § 780-113.

[6] Appellant was serving this prison term at the time of his hearing.

[7] I.D. supra, n. 2 at p. 4.

decisions and remand his case for a discretionary assessment of the sanction by the law judge. Counsel for the Commandant has submitted a brief in opposition.

Upon consideration of the parties' briefs and the entire record, we conclude that the findings of the law judge, as affirmed by the Commandant, are supported by reliable, probative, and substantial evidence. We adopt their findings as our own, together with our further findings herein. Moreover, we agree that the sanction is warranted under 46 U.S.C. 239b.

It is our view that appellant's affirmative claims respecting the conviction, in reliance solely on his own testimony at the hearing, were not sustained. He offered no direct evidence that he was entrapped by the police but simply described circumstances wherein a girl had persisted in imploring him to obtain the marijuana for her boyfriend who "turned out to be a state trooper" (Tr. 21). This may have been sufficient to take the issue to the jury, but we cannot assume that a verdict would have been returned in his favor based on that defense.[8] Nor would we infer from such circumstantial evidence in this proceeding, even disregarding its lack of corroboration in any particular and self-serving aspects, that the police instigated or had anything whatever to do with the girls importuning of appellant or that she was acting as a police informer or agent. We thus reject his claim of entrapment as mere speculation.

In claiming that his guilty plea was improperly induced, appellant testified that his defense counsel met him outside the courtroom on the date of trial, "put some paper on the wall...and says sign this, you're pleading guilty to the possession and sale of narcotics and that was it" (Tr. 23). Here again he failed to produce corroborating evidence,[9] relying instead on the meagre ground of self-serving testimony. We are not persuaded that it represents an accurate or complete account of the circumstances surrounding his plea. Consequently, we find no reasonable degree of proof substantiating appellant's claim. Moreover, it clearly

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[8] See United States ex rel. Hall v. Illinois, 329 F. 2d 354 (CA 1, 1964), cert. den. 379 U.S. 891 (1964); People v. Hall, 25 Ill. 2d 297, 185 N.E. 2d 143 (1962).

[9] Appellant was advised at the outset of his right to have witnesses subpoenaed (Tr. 6-7). He called none of the persons named in connection with either of his claims to testify of be deposed in this proceeding, including the girl and her parents with whom he had a close family relationship (Tr.16), or his former counsel.

appears that he was dealing with amounts of marijuana not considered small, under the narcotic drug law of the convicting jurisdiction.[10]

Appellant was advised by the Commandant's decision that if his conviction is "overturned by the courts" his sanction may be rescinded under 46 CFR 5.20-190(b).[11] That procedure is reserved to the Commandant's discretion. However, should appellant, now serving on parole, obtain collateral relief in the state court,[12] we believe that the factors presented in mitigation such as his model behavior in prison, his commendable record of prior seaman's service for over 20 years, and the possible loss of his pension rights, are sufficiently persuasive that his sanction should not be unduly prolonged.

The regulation challenged by appellant is 36 CFR 5.03-10, which provides, in pertinent part, as follows:

> §5.03-10 Court convictions in narcotic cases. (a) After proof of a narcotics conviction by a court of record as required by Title 46, U.S. Code, section 239b, the Coast Guard may take action based upon this conviction. After proof of alleged conviction..., the administrative law judge shall enter an order revoking the seaman's...documents...."

We have disagreed previously with the Commandant's often stated explanation for this regulation, repeated here, that "the grant of

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[10] Pennsylvania's Drug Act defines a small amount of marijuana, for purposes of classifying certain minor offenses, as being no more than 30 grams. §780-113, supra n. 5, at subsection (31).

[11] This regulation provides that a revocation order based on a narcotics conviction may be rescinded when "the applicant submits a specific court order to the effect that his conviction has been unconditionally set aside for all purposes." The Commandant's error in citing this regulation as 33 CFR 137.20-190(b) is hearby corrected.

[12] Although appellant complains of his defense counsel's failure to arrange "pre-indictment" relief, his brief is silent on the right available to a convicted person imprisoned in Pennsylvania or on parole or probation to file a petition, based on the asserted incompetency of his defense counsel, seeking to vacate his conviction by judicial decree. See Pennsylvania's Post - Conviction Hearing Act, 19 P.S. § 1180-1, et seq.

discretion [in 46 U.S.C. 239b] runs solely to the Investigating Officer who decides whether or not to prefer charges."[13] Nonetheless, the law judge retains sufficient regulatory discretion to conduct hearings pursuant to the Administrative Procedure Act, as prescribed in 46 U.S.C. 239b, by entering recommendatory findings on the issues to be determined.[14] In this sense, we believe that the law judge's regulatory discretion may be construed in substantial conformity with the statutory hearing requirements. Since in the case before us there was no necessity for recommended findings on mere unsubstantiated claims, we adhere to a previous ruling in this class of cases, that "The Board is not disposed to test the reasonableness of the regulation, where no facts are adduced for consideration of any other sanction save revocation under 46 U.S.C. 239(b)(1).[15]

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal be and it hereby is denied; and

2. The Commandant's order affirming the revocation of appellant's seaman's documents by the law judge, under authority of 46 U.S.C. 239b, be and it hereby is affirmed.

REED, Chairman, McADAMS, THAYER, BURGESS, and HALEY, Members of the Board, concurred in the above opinion and order.

(SEAL)

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[13]Commandant v. Mills, NTSB Order No. EM-43, adopted April 2, 1975; Commandant v. Moore, NTSB Order No. EM-39, adopted October 10, 1974; Commandant v. Packard, 1 N.T.S.B. 2301 (1972).

[14]The Administrative Procedure Act provides that"...all decisions, including initial, recommended, and tentative decision,...shall include a statement of --(A) findings and conclusion, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record; and (B) the appropriate...sanction, relief, or denial thereof." 5 U.S.C. 557(c).

[15]Commandant v. Snider, supra, n. 1 at p. 2181.